

Westside Painting, Inc. and International Brotherhood of Painters and Allied Trades, District Council #55, AFL-CIO. Case 36-CA-8067

December 19, 2000

**SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND LIEBMAN**

On September 30, 1999, Administrative Law Judge William L. Schmidt issued the attached supplemental decision. The Respondent filed exceptions, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the June 29, 1998 recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the June 29, 1998 recommended Order of the administrative law judge as modified below and orders that the Respondent, Westside Painting, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order."

2. Substitute the following for relettered paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Portland, Oregon facility copies of the attached notice marked 'Appendix.'⁶ Copies of the notice, on forms pro-

vided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1997."

Linda Scheldrup, Esq., for the General Counsel.

Sam Boulis, President of Westside Painting, Inc., of Portland, Oregon, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On June 29, 1998, I issued my Decision and Recommended Order in the above matter finding that Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully interrogating and refusing to hire applicant Shawn Cotto. Thereafter, Respondent filed timely exceptions to my decision with the National Labor Relations Board asserting, inter alia, that I erred in granting the General Counsel's motion for approval to take telephonic testimony.

On June 24, 1999, the Board issued its Decision and Order Remanding to Administrative Law Judge wherein it concluded that I should have denied the General Counsel's motion on the ground that telephonic testimony is not admissible under the Board's Rules. *Westside Painting, Inc.*, 328 NLRB 796 (1999). In its Order, the Board struck the telephone testimony of Shawn Cotto and remanded the case to me to either reopen the record to allow the General Counsel to bring in Cotto to testify in person at a hearing, or to proceed on the record without consideration of Cotto's telephone testimony and to thereafter revise my findings, conclusions, and recommendations, if appropriate, in a supplemental decision.

Having now concluded consideration of this matter on remand in accord with the Board's direction, I make the following

FINDINGS OF FACT

A. Action on Remand

On July 7, 1999, I issued an order providing the General Counsel until the close of business on July 21 to notify me as to which course of action permitted under the Board's June 24 Order would be elected by the General Counsel. After granting the General Counsel's request to extend the time in which to reply to July 28, counsel for the General Counsel filed an application to take testimony by deposition dated July 28. In support, counsel for the General Counsel alleged that Cotto was

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, the Respondent contends that some of the judge's findings demonstrate bias. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

² We shall modify the judge's June 29, 1998 recommended Order to conform to *Excel Container, Inc.*, 325 NLRB 17 (1997), and to correct his inadvertent omission of a record's preservation provision.

confined to a correctional center in East Elmhurst, New York, and, for that reason, would be unavailable to appear for a reopened hearing in Portland. On that same date, I issued an Order to Show Cause requiring Respondent to show cause on or before August 6 why the General Counsel's application should not be granted. Thereafter, Respondent timely filed its Objection to Application to Take Deposition. Respondent argued that its right to due process and a fair hearing would result from deposing Cotto in lieu of presenting in-person testimony by Cotto before the administrative law judge as that would deny the administrative law judge an opportunity to evaluate Cotto's demeanor.

Before ruling on Respondent's objection, counsel for the General Counsel filed a withdrawal of application to take testimony by deposition. In that withdrawal request, counsel for General Counsel also requested that I now decide this matter "on the record without consideration of Cotto's telephone testimony." On August 23, I issued an order approving withdrawal and fixing date for filing of briefs. In this latter order I granted the General Counsel's withdrawal of application to take testimony by deposition and allowed the parties until September 17 to file written briefs containing further argument. The General Counsel submitted a written brief; Respondent did not.

B. Further Findings and Conclusions

In my original decision, I detailed the conflicting testimony relative to Cotto's August 18, 1997 personal interview for a job as an apprentice painter with Respondent. At that time, I concluded that the account of that interview provided by Cotto and Gayland Gabbard, Cotto's instructor at the Timberlake Job Corps Center in rural Oregon, should be credited over the account provided by Sam Boulis, Respondent's owner, and Roy Porter, a superintendent for Respondent at the time of the relevant event. Based on the credited account of Cotto and Gabbard, I further concluded that Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully interrogating Cotto concerning his union sympathies and by refusing to hire Cotto after he disclosed his prounion sympathies.

As noted above, the Board struck the testimony of Cotto in its entirety. In addition, the General Counsel has opted against seeking to reopen the hearing in order to call Cotto as a witness in person, or against obtaining and offering a deposition from Cotto. Accordingly, I have now thoroughly reviewed the record without giving consideration to Cotto's prior testimony. Having completed that review, I remain convinced Gabbard provided the more credible account of Cotto's job interview. Hence, without regard to Cotto's corroborating testimony, I

find that Gabbard's account standing alone is truthful and the account provided by Boulis and Porter is not for the same reasons specified in my original decision dated June 29, 1998.

Crediting Gabbard's account as I do, I again find that Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully interrogating Cotto about his union sympathies in the course of the August 18, 1997 interview and refused to hire him after Cotto expressed prounion sympathies. In these circumstances, I find it unnecessary to revise my June 29, 1998 findings, conclusions, and recommendations. I therefore enter the following recommended¹

ORDER ON REMAND

1. The Respondent, Westside Painting, Inc., its officers, agents, successors, and assigns, shall take that action specified in the administrative law judge's recommended Order of June 29, 1998, in order to remedy the unfair labor practices found in this case.

2. The record in this case is amended to include the documents specified in the attached "Appendix" generated after the Board's June 24, 1999 Decision and Order Remanding to Administrative Law Judge.

APPENDIX

The record in Case 36-CA-8067 shall include the following documents:

1. Order of administrative law judge dated July 7, 1999.
2. The General Counsel's request for extension of time to reply to administrative law judge Order dated July 16, 1999.
3. Order of administrative law judge dated July 19, 1999.
4. The General Counsel's application to take testimony by deposition dated July 28, 1999.
5. Administrative law judge's Order to Show Cause directed to Respondent dated July 28, 1999.
6. Westside Painting, Inc.'s objection to application to take deposition dated August 5, 1999.
7. The General Counsel's withdrawal of application to take testimony by deposition dated August 19, 1999.
8. Administrative law judge's order approving withdrawal and fixing date for filing of briefs dated August 23, 1999.

¹ If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order on Remand shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.